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No. 81-2127

IN THE

Supreme Court of the United States

October Term, 1981

VINCENT B.,

Plaintiff and Appellant,

vs.

JOAN R., *et al.*,

Defendants and Respondents.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Five.

MOTION TO DISMISS OR AFFIRM.

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No. 81-2127

IN THE

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VINCENT B.,

Plaintiff and Appellant,

vs.

JOAN R., *et al.*,

Defendants and Respondents.

MOTION TO DISMISS OR AFFIRM.

Appellees Joan Ross, Frank Ross and Zan Ross (sometimes collectively "the Rosses")[1] move pursuant to Rule 16(1)(b) and (d) for this Court now to dismiss the instant appeal, or in the alternative, for this Court summarily to affirm the judgment of the California Court of Appeal (Second Appellate District, Division Five) and the California Supreme Court, which denied appellant's Petition for Hearing. Appellees contend that the California judgment rests on adequate and independent state bases and that the federal questions of the judgment are so insubstantial as not to warrant further argument.

[1]Upon stipulation, the names of all parties heretofore have been abbreviated in all Court opinions to protect the privacy of the child and the overall confidentiality of the matter. The trial court file was sealed. This Court is requested similarly to abbreviate and protect all names in any opinion or order.

PRELIMINARY STATEMENT.

Appellant's Jurisdictional Statement offers not a single authority or argument not fully and correctly disposed of by the California courts in conformity with decisions of California, all other states, and of this Court. The Jurisdictional Statement also fails to advise this Court that the judgment is supported fully by adequate and independent state bases. Nor does the Jurisdictional Statement, under any interpretation, raise any issue worthy of this Court's attention. To the contrary, appellant acknowledges that his only point here is that he has a "constitutional right" to ignore the presumption of legitimacy afforded to a child born of a married couple as expressly set forth in California *Evidence Code* section 621, so as to unilaterally bastardize a child, now 12 years old. The husband and wife always have denied that appellant was anything but a stranger.

California *Evidence Code* section 621 conclusively presumes that a child born to a woman married and cohabitating with her husband who is not impotent or sterile is the legitimate child of the husband and wife.

Here, the child, Zan, was born on May 11, 1970, as the child of a marriage then duly existing between Frank and Joan, who had been married since 1961. It is undisputed that the Rosses satisfied all the statutory requirements of *Evidence Code* section 621, and that Zan therefore is entitled to its protection of absolute legitimacy. Moreover, from birth, both Frank and Joan at all times have mutually acknowledged without exception that Zan was and is the son of their marriage. Frank continuously has so believed and always has supported and nurtured Zan as his natural son.

It is established as California public policy that *Evidence Code* section 621 acts as a shield preserving the integrity of the family unit, fostering child rearing in a harmonious family setting, and preventing a child from being bastar-

dized. To accomplish these social policies, the California courts have uniformly held that no one meeting the requirements of section 621 can overcome its conclusive presumption: not the husband (e.g., *County of San Diego v. Brown*, 80 Cal.App.3d 297 (1978)); not the mother (e.g., *S.D.W. v. Holden*, 275 Cal.App.2d 313 (1969)); and not even the child (e.g., *Ferguson v. Ferguson*, 126 Cal.App.3d 744 (1981)).

The decision of the Court of Appeal here simply recognized that the conclusive presumption of section 621 is obviously applicable against a stranger to the family, one who by his own pleading admitted that he willfully concealed his claim of paternity from the child's father, Frank, for more than seven years, allowing Frank to nurture and support Zan without any shadow of doubt that Zan was Frank's child.

The decision of the Court of Appeal was also decided in conformity with this Court's opinion in *Stanley v. Illinois*, 405 U.S. 645 (1975) and the California Supreme Court's opinion in *In re Lisa R.*, 13 Cal.3d 636 (1975), which were exclusively and mistakenly relied upon by appellant Briggs in support of his constitutional attacks.

In both *Stanley* and *Lisa R.*, it was undisputed at all stages of the proceedings that the man seeking custody of the subject child was the actual father of that child. Here, the only allegation that Briggs is the "father" of Zan is the allegation made by Briggs himself, first raised in the complaint seven years after Zan's birth and denied throughout by Joan and Frank.

Neither *Stanley* nor *Lisa R.* have application to a case where, as here, the claimant to the child is a stranger whose authenticity always was denied by the undisputed mother, who by his own admission held himself secret for seven

years, and even then never made disclosure to the lawful father.

The trial court first granted demurrers without leave to amend, and then granted summary judgment dismissing the action not only on the grounds of section 621, and also on the separate and independent grounds of the statute of limitations contained in section 343 of the California *Code of Civil Procedure* and on grounds of common law equitable estoppel. The failure of Briggs to file any claim of paternity within four years of Zan's 1970 birth barred his action pursuant to section 343. Indeed, Briggs undisputedly waited, with full knowledge of his claim, for three additional years before filing a complaint. Independent of any statute of limitations, Briggs was barred by the doctrine of equitable estoppel by knowingly standing silent, without offering any financial support to Zan for seven years, before asserting any claim to be established as "father."

The presumption of section 621, the statute of limitations of section 343, and equitable estoppel each are independently correct and sufficient grounds, standing alone, for sustaining the dismissal of Briggs' action and requiring that this appeal be summarily dismissed, or in the alternative, that the judgment of the Court of Appeal summarily be affirmed.

STATEMENT OF THE CASE.

On May 10, 1977, one day prior to Zan's seventh birthday, Briggs filed an action to establish himself as the father of Zan.

On July 11, 1977, the Rosses demurred to Briggs' action on the ground that the conclusive presumption of legitimacy contained in California *Evidence Code* section 621 precluded the possibility of Briggs ever stating a cause of action. The demurrers were sustained with leave to amend.

Briggs then took advantage of the leave to amend and filed his First Amended Complaint on September 14, 1977. The Rosses again demurred on the basis of section 621. The demurrers were again sustained, this time without leave to amend. Briggs appealed this ruling.

On April 5, 1979, the California Court of Appeal (2nd Civ. No. 53883, Second District, Division Three) reversed the sustaining of the demurrers without leave and remanded the case to the trial court. The Court of Appeal held that since Briggs had not expressly pleaded facts giving rise to the conclusive presumption of section 621, the Rosses could not invoke the protection of that section by demurrer and that, in the absence of section 621, Briggs had stated a cause of action under the Uniform Parentage Act, California *Civil Code* section 7004(a)(4) because he allegedly "receive[d] the child into his home and openly [held] out the child as his natural child."

On June 28, 1979, the Rosses invoked section 621 by way of declarations on a motion for summary judgment. Their motion was accompanied by supporting declarations which established all the elements of the conclusive presumption of legitimacy of section 621, thereby satisfying the objection raised by the Court of Appeal that Briggs' First Amended Complaint itself did not contain sufficient facts to give rise to the presumption. The declarations of the Rosses also established facts requiring the dismissal of Briggs' action based on the statute of limitations contained in section 343 of the *Code of Civil Procedure* and on the doctrine of equitable estoppel.

On the very morning of oral argument on the Rosses' motion for summary judgment, Briggs moved to peremptorily disqualify, pursuant to section 170.6 of the *Code of Civil Procedure*, the judge duly noticed to hear the Rosses'

motion. The judge refused to recuse himself, ruling that Briggs' motion was untimely.

Briggs then filed a Petition for a Writ of Prohibition regarding the disqualification. (2nd Civ. No. 57244.) The California Court of Appeal (Second District, Division Four) filed an opinion on January 28, 1980 granting a Writ of Prohibition or Mandate precluding the subject from hearing any other matter in the action. On July 3, 1980, upon remand, the Rosses moved to reset their motion for summary judgment before another judge of the superior court.

On September 19, 1980, another judge of the court, after review and oral argument, granted the Rosses' motion for summary judgment on all grounds set forth in the motion, including, but not limited to, *Evidence Code* section 621, *Code of Civil Procedure* section 343, and equitable estoppel, and entered an order dismissing the First Amended Complaint. Briggs appealed.

The California Court of Appeal (Second District, Division Five), in an opinion certified for publication, affirmed the order dismissing the First Amended Complaint on the basis of section 621 alone. Affirmance based on section 621 did not require the Court of Appeal to discuss the other grounds for the dismissal of the action, specifically the statute of limitations of section 343 or the doctrine of equitable estoppel.

Briggs failed to file any Petition for Rehearing to the Court of Appeal questioning either the facts or the law stated in the Court of Appeal's decision notwithstanding that *California Rules of Court*, Rule 29(b) proscribes that the California Supreme Court "will not examine the record for error unless . . . that such issues were raised in the briefs *and set forth in a petition for rehearing in the Court of Appeal.*" (emphasis added.)

Briggs filed a Petition for Hearing with the California Supreme Court on January 18, 1982. In the Petition for Hearing, Briggs abandoned all previously raised issues except for certain claims of denial of due process rights patently improper under any theory. Furthermore, Briggs conceded that there were no triable issues as to the application of section 621. Briggs also left unchallenged the propriety of the dismissal of the action based on statute of limitations and equitable estoppel grounds. The California Supreme Court summarily denied Briggs' Petition for Hearing on February 17, 1982.

On April 21, 1982, Briggs filed his Notice of Appeal to this Court.

STATEMENT OF FACTS.

At the trial court, in opposition to the Rosses' motion for summary judgment, Briggs submitted his own declaration and the declarations of two former housekeepers of the Rosses. Nothing stated in any of those declarations raised any factual issue precluding application of section 621. Nowhere did the declarations refute that Joan and Frank cohabited as lawful husband and wife at the time of Zan's conception and that Frank was neither impotent nor sterile.

Nor did anything contained in the declarations offered by Briggs refute the undisputed fact that he admittedly stood silent for seven years, allowing and encouraging Frank to believe that Zan was his son and to treat him accordingly by providing Zan's support and maintenance and allowing Frank and Joan to state publicly that Zan was and is the child of Frank. Indeed, based on Briggs' own declaration, he apparently sought willfully to defraud Frank for seven years, in that Frank was encouraged to and, in fact, did support and maintain Zan. Thus, Briggs offered no facts which precluded the dismissal of his action based on the

statute of limitations contained in section 343 of the *Code of Civil Procedure* or on the doctrine of equitable estoppel.

The Court of Appeal found that there were no triable issue of fact as to the application of section 621. Briggs did not challenge that finding or any other of the Court of Appeal's findings by way of Petition for Rehearing. In his Petition o the California Supreme Court, Briggs conceded the facts of the action as being without dispute. The facts undisputedly established include the following:

Frank and Joan were lawfully married in Beverly Hills, California, on May 13, 1961, and remained continuously married as husband and wife for the next 13 years, through May 1974.

Joan gave birth to Zan on May 11, 1970. Zan was a normal, nine month term baby and was therefore conceived on or about August 10, 1969.

At all times during the years 1969 to 1974, including the entire years 1969 and 1970 when Zan was conceived and born, Frank and Joan resided and lived together in the same residence as husband and wife "in every sense of the word".

Frank and Joan engaged in sexual intercourse numerous times during the year 1969, including the months of July, August and September of that year. During much of the summer of 1969, Frank and Joan were alone together on a trip outside the United States. At all times during the year 1969, Frank was neither impotent nor sterile. Frank has never been told that he is or has ever been impotent or sterile. In fact, Frank fathered another son during a previous marriage.

Frank is and has been at all times named and acknowledged as the father on Zan's birth certificate, on all of Zan's other birth documents, and on all public documents prepared or filed by Joan or Frank, including all school

records and passports. No person, other than Frank, has ever been listed on such documents as Zan's father.

At all times since the birth of Zan, Frank has believed, considered, treated and looked upon Zan as his biological and legal son. Frank has at all times publicly represented and acknowledged Zan to be his child in all respects.

At all times since the birth of Zan, Joan has believed, considered, treated and looked upon Zan as the child of Frank. She has publicly represented and acknowledged Zan in all respects to be the son of her husband, Frank.

No one other than Frank or Joan has ever supported Zan.

Zan has never lived or resided with anyone other than Frank or Joan. Upon Zan's birth, Frank received Zan into his home and ever since has openly held out Zan as his natural child.

Prior to the filing of his action on May 10, 1977, Briggs never stated or communicated to Frank in any manner that Frank was not the natural father of Zan, despite Briggs' admitted knowledge of his "claim" since at least the birth of Zan. Only Joan was served with a copy of Briggs' action. She then reported the existence of the action to Frank.

ARGUMENT.

I.

THE EXISTENCE OF ADEQUATE STATE GROUNDS SUPPORTING THE JUDGMENT PREVENTS ANY INVOCATION BY BRIGGS OF THIS COURT'S JURISDICTION.

It is well settled that this Court will not review a state court judgment based upon an adequate and independent state ground, even though a federal question be involved and perhaps wrongly decided. As stated by the Court in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1943):

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the parti-

> tioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

The following and independent state grounds require dismissal of Briggs' action, even if this Court, assuming *arguendo*, should find error in any federal issue:

A. Briggs Has No Standing Under the Uniform Parentage Act.

In its initial opinion in this case, the Court of Appeal, in deciding the propriety of sustaining demurrers to Briggs' action, held that Briggs stated a cause of action because he was a presumed father under *Civil Code* section 7004(a)(4) of the Uniform Parentage Act. Section 7004(a)(4) provides in pertinent part:

> "A man is presumed to be the natural father of a child if . . . he receives the child into his home and openly holds out the child as his natural child."

However, the declarations submitted by Briggs show that at most Zan "sometimes" slept overnight at Briggs' residence. Briggs left unrebutted that he has never paid for the support and maintenance of Zan and that Frank has paid for such support and maintenance at all times since Zan's birth. Nor did Briggs rebut that Zan has never resided with anyone other than Frank or Joan. The trial court on summary judgment found that Briggs was not a presumed father under section 7004(a)(4).

Briggs' parentage claim that he "receive[d] the child into his home" by overnight visits is absurd. The very fact that Briggs "sometimes" looked after the child on an overnight visit itself demonstrates that he never received the child into his home in the way a father would his child — that is, on a continuous basis providing support, shelter and clothing. Any other construction of section 7004(a)(4) would bring about the circumstance that whenever a mother permits a male friend to visit the child (including presumably occasional overnight visits at the male friend's house), she risks the possibility of bastardizing the child. The net result would be that mothers would be well-advised to prohibit all visitation of their children by men altogether, rather than create the possibility that the man will claim the child as his own. Conversely, male friends would be well advised not to bring any children to visit them at their home or they might be subject to a claim of presumed paternity by the mother. The result of such a construction of the statute would work a severe deprivation, particularly upon single mothers and fatherless children.

Since Briggs is not a presumed father under section 7004(a)(4), he has no standing to bring his action.

B. Briggs' Action Is Barred by the State Statute of Limitations.

Briggs' Jurisdictional Statement ignores that the trial court also granted summary judgment based on the statute of limitations contained in section 343 of the *Code of Civil Procedure*. Section 343 requires that all actions not otherwise expressly covered elsewhere in the *Code of Civil Procedure* be commenced within four years after the cause of action has accrued. (*Turner v. Milstein*, 103 Cal.App.2d 651, 658 (1951).) This issue was correctly decided.

The *Code of Civil Procedure* contains no specific limitations section regarding Briggs' action. Therefore, the "catchall" provision of section 343 must be applied.

In an action to establish paternity, courts generally have held that applicable statutes of limitations begin to run from the date of the child's birth. (*See, Annot.* 59 A.L.R. 3d 685, 724-725.)

The accrual of Briggs' action in 1970, the year of Zan's birth, is the only appropriate date because Briggs admits that he knew of all the material facts regarding his paternity no later than the time of Zan's birth. According to the allegations contained in Briggs' *verified* First Amended Complaint, he "accepted and treated [Zan] as [Briggs'] own natural child" "since the birth of [Zan]" and "he visited, talked and took [Zan] places frequently, regularly and continuously after the birth of [Zan]."

Briggs' action, however, was filed on May 10, 1977, one day prior to Zan's *seventh birthday* and *three years after* the limitations period of section 343. In prior briefs, Briggs never disputed the applicability of section 343 to his action. Instead, Briggs limited his arguments as to when his cause of action accrued. In making this argument, Briggs relied upon various other excerpts from *Annot.* 59 A.L.R.3d 685 and *Ruddock v. Ohls*, 91 Cal.App.3d 271 (1979), which were misplaced. The excerpts in the *Ruddock* case involved entirely different fact situations than here. This action is brought by an alleged putative father, after seven years, to establish himself as the natural father of a child born and raised by an established family. The excerpts in the case cited by Briggs involved actions brought on behalf of children who did not have fathers or whose fathers did not support them. Neither is the case here.

Section 343 establishes an adequate and independent state ground for rejection of Briggs' action.

C. Briggs' Action Is Also Barred by Equitable Estoppel.

It is undisputed that Briggs stood silently by and waited seven years before filing any action, despite his admission that he believed he was the father of Zan since Zan's birth. Briggs did not support Zan during those seven years. He did not even attempt to dispel Frank's reasonable belief that Zan was Frank's child. Because of his conduct and utter lack of diligence, the trial court also granted summary judgment based on the doctrine of equitable estoppel, a fact which Briggs chose to ignore in his Jurisdictional Statement.

While normally applicable in the commercial area, equitable estoppel has been found to have equal application in determining the existence or non-existence of the relationship between a putative father and child. (*In re Marriage of Valle*, 53 Cal.App.3d 837, 841 (1975); *Clevenger v. Clevenger*, 189 Cal.App.2d 658, 673 (1961).)

By his silence Briggs consciously and knowingly encouraged Frank and Zan, both of whom undisputedly had no knowledge of Briggs' claims, to establish and nurture a father-child relationship. Briggs sat back and knowingly let Frank provide support for the child. Frank and Zan will obviously have acted to their detriment if after nearly 12 years, their relationship is now held terminated and Zan is bastardized.

The bar of equitable estoppel provides an adequate and independent state ground for deciding the matter. (*See, Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164-165 (1917).)

D. California Rules of Court Also Provide an Adequate State Ground.

In violation of *California Rules of Court*, Rule 29(b), Briggs did not file any Petition for Rehearing to the Court of Appeal. Furthermore, in his Petition for Hearing to the

California Supreme Court, Briggs omitted any reference to the Uniform Parentage Act, the statute of limitations contained in section 343, or the doctrine of equitable estoppel. It is therefore not surprising that the Court of Appeal's opinion contains no direct reference to the foregoing or that the California Supreme Court summarily denied hearing.

Accordingly, the Rosses respectfully submit that there are adequate and independent state grounds supporting the state judgment below and that the instant appeal should be dismissed.[2]

II.

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Even if this case is considered to involve other than state grounds, the Court of Appeal's resolution of each federal issue is so eminently correct so as to warrant affirmance without argument before this Court. The Court of Appeal decided each federal issue in conformity and in a manner consistent with decisions of its own State, of other states, and of this Court. Additionally, because of Briggs' unconscionable delay in asserting this claim and total failure to support the child, together with other facts peculiar to the case, no substantial federal question requiring nationwide attention is raised. As stated by this Court in *Layne and Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393 (1923), a case involving a writ of certiorari, but whose logic is applicable here:

> ". . . the answer is that it is very important that we be consistent in not granting the writ of certiorari except

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[2]Any question as to the existence of adequate and independent state grounds here should be resolved by remand to the Court of Appeal. (*California v. Krivda*, 409 U.S. 33 (1972).)

in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . ."

A. There Is No Triable Issue as to the Application of Section 621.

Notwithstanding any other provision of law, *Evidence Code* section 621 conclusively presumes that a child born to a woman married and cohabiting with her husband, who is not impotent or sterile, is a legitimate child of the husband and wife. The Court of Appeal specifically found that "there are no triable issues of fact as to the conditions for application of the presumption." (Opinion, pp. 4-6.) Briggs did not challenge this finding by Petition for Rehearing. Briggs conceded the issue in his Petition for Hearing to the California Supreme Court.

Briggs is barred from again raising this issue. (*California Rules of Court*, Rule 29(b).) Notwithstanding, in what is yet another basic question of state law, Briggs now contends that a triable issue exists. (J.S., pp. 7-8.) That issue, not proper of this Court's consideration, was in any event correctly decided by the Court of Appeal. The declarations established without any issue of fact each and every element of section 621: lawful marriage, cohabitation, and lack of impotency and sterility.

B. The Overriding Social Policies Underlying Section 621 Are Served by the Dismissal of Briggs' Action.

Briggs next argues in his Jurisdictional Statement, on pages 8-9, that section 621 has no application here because no social policy is served.

The presumption that a child born in lawful wedlock is legitimate has been the statutory law of California since 1872. As stated by the court in *Keaton v. Keaton*, 7 Cal.App.3d 214, 215-216 (1970):

> "Section 621 codifies a centuries-old principle that the integrity of the family, when huband and wife are living together as such, should not be impugned. The husband is deemed responsible for his wife's child if it is conceived while they are cohabiting; he is the *legal* father and the issue of biological paternity is irrelevant." (emphasis in original; *see also, Louis v. Louis*, 7 Cal.App.3d 851, 853 (1970).)

Additionally, section 621 protects the innocent child from the *social* stigma of illegitimacy which cruelly remains notwithstanding that by the adoption of the Uniform Parentage Act, the State Legislature has attempted to remove the *legal* effects of illegitimacy. (*In re Marriage of B.*, 124 Cal.App.3d 524, 529-530 (1981).)

To effectuate these social policies, section 621 has been uniformly held to bind all persons and not just husbands. In *S.D.W. v. Holden, supra*, 275 Cal.App.2d 313, an action brought by a mother to declare a man other than her husband to be the father of her child was rejected on the basis of section 621. Similarly, in *Ferguson v. Ferguson, supra*, 126 Cal.App.3d 744, the court affirmed the granting of summary judgment based on section 621 against an action brought by a minor child to declare a man other than his mother's husband as his father.

The Court of Appeal's opinion simply holds, in conformity with past decisions, that a stranger to the family, like all others, is equally bound by section 621. To have held otherwise would have destroyed the social policies underlying the section.

Application of section 621 prevents Briggs from taking Zan away from Frank and destroying a father-child relationship which has existed since Zan's birth — a relationship that Briggs waited seven years to challenge. The dissolution of the marriage between Joan and Frank, while altering their

legal relationship, obviously does not lessen, let alone terminate, the legal and social relationship that each of the Rosses has with Zan. (see, Civil Code section 460(a).) Section 621 has been held applicable notwithstanding a husband's and wife's divorce. (*Ferguson v. Ferguson, supra*, 126 Cal.App.3d 744, 746; *see also*, this Court's decision in *Quilloin v. Walcott*, 434 U.S. 246 (1978).)

Moreover, it cannot be disputed that Briggs' action seeks, in violation of social policy, to declare Zan to be illegitimate, the result of an adulterous affair. The overriding social policies of section 621 are in fact served by the dismissal of Briggs' action.

C. Briggs' Arguments That Section 621 Violates Due Process Are Without Merit.

Briggs renews his contention that application of section 621 violates his due process rights. (J.S., pp. 9-10.) In his Jurisdictional Statement, Briggs makes a number of different arguments in connection with his due process contention. These arguments are collected here under one heading for the Court's convenience. Each of Briggs' arguments is without merit. The Court of Appeal correctly held that "application of the conclusive presumption in the circumstances in this case does not deprive [Briggs] of due process." (Opinion, p. 7.)

1. This Court Should Not in Effect Reverse the Express Legislative Conclusion That Overriding Social Policies Are Served by Section 621.

Briggs argues that section 621 violates due process because of the existence of "modern scientific methods" for determining paternity. In making this argument, Briggs asks this Court to do no less than veto the determination by the Legislature of the State of California that matters of overriding social policy—Preserving the integrity of the family

unit and preventing the stigma of illegitimacy — require that the introduction of any evidence, including blood tests and all other tests, be prohibited to contradict the conclusive presumption of section 621. (*Kusior v. Silver*, 54 Cal.2d 603, 618 (1960); *S.D.W. v. Holden, supra*, 275 Cal.App.2d 313, 315.)

The retention of the conclusive presumption of section 621 was not the result of legislative oversight, as Briggs may suggest. The legislative history of section 621 demonstrates that the Legislature, after considering the matter on repeated occasions, has always voted to retain the conclusive presumption of section 621. The original draft of the Uniform Parentage Act contained in Senate Bill 347 provided for the repeal of section 621. However, section 621 was expressly retained in Senate Bill 347, as enacted. (Note, 28 Hastings L.J. 191, 201 (1976).) In 1980, the Legislature again considered possible repeal of section 621. Though obviously knowing of the existence of "modern scientific methods" the Legislature retained the conclusive presumption of section 621, as superior to any other provision of law.

The introduction of "modern scientific methods" and other testing would open the family unit to attack in each and every case and destroy the social policies found by the Legislature to be of paramount importance.

The courts of California have, without exception, held that the conclusive presumption of section 621 does not violate due process, notwithstanding the availability of blood tests. (*County of San Diego v. Brown, supra*, 80 Cal.App.3d 297 and *People v. Thompson*, 89 Cal.App.3d 193 (1979).) After stating that only a rational basis is required for presumptions affecting legitimacy, the court in *Brown* proceeded to find that such a rational basis exists in section 621. The court stated on page 307 that:

> "Common experience tells us a rational connection exists between conception of the child by a woman during marriage, during cohabitation with a nonimpotent husband, and the ultimate fact of paternity of that man. When conception occurs in such circumstance, it is most rational to designate the husband with whom the wife was living at the time of conception as the father."

Brown and *Thompson* involved cases where the putative father attempted to avoid the establishment of paternity. In each case the constitutional attacks of the putative father were rejected, notwithstanding that arguably similar rights as here were at issue. The same rational basis found in *Brown* exists here, particularly since the mother, Joan, declares and acknowledges Frank to be Zan's father.

2. Neither Lisa R. Nor Stanley Dealt With the Peculiar Facts Here; Both Cases Are Readily Distinguishable as Dealing With the Constitutional Rights of a Man Undisputed as Natural Father.

Briggs improperly argued in the courts below and now argues here that the cases of *Stanley v. Illinois, supra*, 405 U.S. 645 and *In re Lisa R., supra*, 13 Cal.3d 636, hold that applicability of section 621 to this case violates due process.

The numerous and substantial factual differences between the instant case, on the one hand, and *Lisa R.* and *Stanley*, on the other hand, commands the conclusion that operation of section 621 in this case does not violate due process. Indeed, the court in *Lisa R.* expressly limited its holding to the facts presented in that case by stating:

> "The reasonableness of a statutory limitation on the right to offer proof of parentage depends on circumstances prevailing in each particular case. Accordingly, a court, before receiving evidence thereof, must in each instance make a preliminary determination, as by offer

of proof, that due process concepts would be offended if the particular claimant to parentage were denied an opportunity to prove his claim." (13 Cal.3d 636, 651, fn. 17.)[3]

Briggs' Limited Interest.

In both *Lisa R.* and *Stanley*, the courts found that the putative fathers' interest in the children in question was "not only cognizable but also of sufficient substance to warrant [constitutional] deference." (13 Cal.3d 636, 648; 405 U.S. 645, 651.) However, in both cases, there was *no dispute* as to the identity of the natural father. The Court in *Stanley* stated on page 651 that, "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." In *Lisa R.*, the court found that "[t]he private interests which appellant seeks to preserve in the instant case as in *Stanley* arose from more than the mere biological fact that he is Lisa's natural father. Lisa was not conceived as the result of a casual relationship." (13 Cal.3d 636, 649.)

In *Lisa R.*, the court observed that the putative father, through his contact with the child, which included residing with her and the natural mother before and after Lisa's birth,

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[3]Despite conceding in the California Supreme Court that no triable issue as to the application of section 621 existed, Briggs argued in his Petition for Hearing for the first time on appeal that a triable issue of fact existed as to whether there has been a denial of due process in that the trial court did not have sufficient facts to consider the best interests of the child. He has renewed that argument here. However, no such factual issue was created. First, it was Briggs who had the duty to make a sufficient offer of proof. Secondly, the constitutionality of section 621 is a preliminary question of law. Thirdly, a determination of the applicability of section 621 does not involve inquiry into the best interests of the child; section 621 operates as a matter of law. Indeed, section 621 has been applied even over the objections of a child. *(Ferguson v. Ferguson, supra,* 126 Cal.App.3d 744.)

appearing on her birth certificate and contributing to her support, had legitimized Lisa pursuant to former *Civil Code* section 230 (now *Civil Code* section 7004). (13 Cal.3d 636, 649, fn. 14.) Similarly, in *Stanley* the recognized father lived intermittently with his children and their mother for 18 years.

In sharp contrast, Briggs' declaration revealed that he never undertook conduct which created a father-child relationship. Briggs did not reside with Zan or with Joan, appear on the child's birth certificate, or contribute to the child's support. Regardless of whether or not a father seeks custody of his child, he is obligated to support and educate the child. The father may be criminally liable if he willfully fails to provide his child with necessary food, shelter or medical attention. This is true, even when the mother is legally entitled to custody and regardless of whether or not such necessities are already being furnished by other persons. (*Penal Code* section 270.) It is undisputed that Briggs never supported Zan. Additionally, because he did not "receive" Zan into his home or "openly" hold Zan out as his child, Briggs is not a presumed father under any provision of law, including *Civil Code* section 7004(a)(4).

Thus, instead of having a sufficient interest that is "not only cognizable but also of sufficient substance to warrant [constitutional] deference," Briggs stands as a mere legal stranger to Zan. Nor does Briggs have any legitimate expectation of basing a legally recognized relationship solely on blood ties when he, according to his own version of the facts, had an adulterous relationship with a woman, knowing that she was married to another man. Section 621 recognizes and reflects this lack of any legitimate expectation in Briggs.

Briggs' Delay.

The court in *Lisa R.* found that the putative father had promptly and consistently sought to assert his rights as father. (13 Cal.3d 636, 649.) The putative father in *Lisa R.* acknowledged the child upon birth and, in addition, when he discovered that the child had been declared a dependent ward, he promptly initiated proceedings to terminate her dependency status. In comparison, Briggs waited nearly seven years to assert his alleged rights, despite a self-proclaimed knowledge that he knew from the outset that Zan was his child. In contrast to *Lisa R.*, Briggs delayed so long in asserting his claim for paternity that he must now be equitably estopped from making such an assertion.

Balancing of Interest.

Because it found that the putative father's interest in the child was of "sufficient substance to warrant [constitutional] deference," the court in *Lisa R.* proceeded to balance that interest against the countervailing interest of the State. However, in the instant case, Briggs' purported interest does not warrant such deference. On this basis, any due process claim cannot be sustained, and no balancing need be undertaken. Assuming *arguendo* that a balancing is necessary, it must be noted that given the procedural and factual context of a dependency hearing, the court in *Lisa R.* considered only the interest of the State. In the present case, the interest of the Rosses, both individually and as a family unit, must be considered.

Mother: In *Stanley*, the Court on grounds of equal protection and due process invalidated an Illinois statute which provided that upon the death of an unwed mother her children were made wards of the court without according the unwed father a right to be heard — in effect, presuming the father's unfitness, while presuming the fitness of all other

parents. Since the Illinois statute was triggered by the mother's death, the interest of the mother was not at issue in the case. Similarly, at the time the last dependency hearing was held in *Lisa R.*, the mother, as well as the statutorily presumed father, were deceased.

In contrast, the interest and wishes of Joan, the natural mother, must be considered in the instant case. The court in *Adoption of Rebecca B.*, 68 Cal.App.3d 193, 197 (1977), observed that the absence of the natural mother was of crucial importance to the decisions of *Stanley* and *Lisa R.* when it stated "[w]e are unaware of any decided case extending the benefit of the *Stanley* rule to the putative father where, as here, the natural mother retains custody and control of the child."

Father: In both *Stanley* and *Lisa R.*, there was only a single male asserting his rights as father of the children in question. In sharp contrast, declaring Briggs as the natural father in the instant case would have the effect of terminating the legal and actual parent-child relationship between Zan and Frank, a relationship that Briggs assented to without challenge for seven years.

The presence of a husband who has not disavowed his child's legitimacy, such as Frank, led the court in *Petitioner F. v. Respondent R.*, 430 A.2d 1075 (Del., 1981) to reject the claims of a putative father who sought custody and visitation rights based on *Stanley*. The court stated on pages 1078-1079:

> "*Stanley* has been broadly interpreted as recognizing that unwed fathers are generally entitled to the protection of the Constitution. We fully agree with that concept as a general principle. It does not follow from *Stanley*, however, and the Supreme Court has not held in our view, that a man claiming paternity has a constitutionally protected interest in a determination of his

parental status for purposes of obtaining custody or visitation rights with respect to a child conceived and born during the marriage and cohabitation of the child's mother to and with another who has not disavowed the child's legitimacy.[4] Unlike the instant case, *Stanley* did not involve the potentially uncertain and often turbulent issue of determining paternity; there, . . . the unwed father was conceded by all parties to be the natural father. *Stanley* afforded constitutional recognition to the interest of a putative father in the children he has sired and raised.' That interest is certainly distinguishable from that of the putative father in this case who, in the eyes of the law and in actuality, is a stranger to the child. Most significantly, *Stanley* held that an unwed father's interest warranted due process protection 'absent a powerful countervailing interest.' In *Stanley*, there was no such interest; in this case, however, there exists the very powerful countervailing public interest in promoting the marital relationship, preserving intact an existing family unit . . . Thus, even assuming arguendo that the putative father has a constitutionally cognizable interest, that interest would be outweighed by the competing public interest and public policy in this case, and he must be denied judicial access." (citations omitted; motion to dismiss action affirmed.)

Child: It was recognized by the court in *Lisa R.* that there is an interest in preventing a child from suffering the stigma of illegitimacy. (13 Cal.3d 636, 650; *see also, Petitioner F. v. Respondent R., supra*, 430 A.2d 1075, 1079 [recognizing that there is an interest in "protecting the minor child from confusion, torn affection, and the life-long stigma of illegitimacy."].)

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[4]In the omitted citation, the court distinguished its case from *Lisa R.*

For seven years, Zan was without challenge the legitimate son of Frank. Briggs' action could only have the anomalous result of interjecting uncertainty into the legal status of Zan, affecting not only his legitimacy, but his right to property and inheritance. It would also disrupt the rearing of Zan, which clearly requires a harmonious and stable family setting. Furthermore, a conclusion that Briggs is the father would indicate that Zan was born out of wedlock.

It is clear that Briggs' limited interest is so outweighed by the substantial interests of the Rosses, both as individuals and as a family unit, that application of section 621 in the instant case does not violate due process. An individual such as Briggs, who has no substantial contact with the child, and who waits a period of seven years to challenge a relationship that the child established with his father since birth, cannot be permitted now to oust the father, impugn the family unit, and interject uncertainty into the legitimacy, inheritance, and property rights of that child. Thus, pursuant to section 621, Zan is constitutionally and conclusively presumed to be the child of Frank and Joan as found by all the courts below.

D. Application of Section 621 Against Briggs Does Not Violate Equal Protection.

In the Court of Appeal, Briggs argued that he was a member of the only class of persons precluded by section 621 from introducing evidence to rebut its conclusive presumption, and therefore, was denied equal protection because the class, in which he is a member, is gender defined. The Court of Appeal rejected that argument. (Opinion, pp. 7-8.) Briggs conceded the argument in his Petition for Hearing to the California Supreme Court. However, he has now belatedly raised a similar argument here, which for the following reasons is without merit.

1. Briggs' Argument Was Impermissibly Raised for the First Time on Appeal.

Briggs raised his equal protection argument for the first time on appeal. Briggs did not raise any equal protection argument at the trial court level, and inasmuch as his argument is based on the disputed facts regarding his alleged paternity of Zan, Briggs is precluded from now raising his argument. (*G & D Hauling Construction Co. v. City of Marysville*, 12 Cal.App.3d 989, 997 (1970).) Moreover, Briggs conceded the issue in the California Supreme Court.

2. Briggs Has No Constitutionally Recognized Interest.

As demonstrated previously, the principles of *Stanley* and *Lisa R.* have never been extended to a person when a child is born during a marriage and lives with the family unit after birth.

Briggs, as a stranger to both the marriage and the family of the Rosses, has no constitutionally cognizable interest.

3. All Persons, Including Briggs, Are Bound by the Presumption of Section 621. In Any Event, a Rational Basis Exists for Differentiation in Treatment.

Briggs is simply incorrect when he argues that he is a member of the only class precluded by section 621 from introducing evidence to rebut the conclusive presumption of the section.

In preserving the integrity of the family unit and fostering child rearing in a harmonious family setting, section 621 binds all persons, without any distinction whatsoever. Briggs as a stranger to the marriage is bound by section 621. It is well established that both the mother (*S.D.W. v. Holden, supra*, 275 Cal.App.2d 313) and the husband (*County of San Diego v. Brown, supra*, 80 Cal.App.3d 297) are also bound by section 621.

Closer examination reveals that Briggs' argument is actually based upon section 621, as amended in 1980, which permits a husband, within two years after the birth of the child, to introduce blood tests to disprove his paternity. Briggs claims that this distinction, accorded only the husband, somehow violates equal protection.

However, by its own express terms, section 621, as amended in 1980, has no application to this case inasmuch as summary judgment was entered before the effective date of the amendment.

In any event, the alleged distinction between husbands and non-husbands is not in the final analysis gender based. Therefore, any rational basis at all is sufficient to support the distinction. A rational basis is present in only allowing a member of the family itself to challenge paternity.

This rational basis was found to exist in *Petitioner F. v. Respondent R., supra*, 430 A.2d 1075.

In that case, the non-husband claimed that his denial of standing to assert custody or visitation privileges violated equal protection because the denial of standing acted in favor of the husband's interest in the child over his own. The court rejected that argument as being untenable and stated:

> "A husband and acknowledged legal father is a vastly different situation from that of a man, outside the family unit, claiming to be the father. Dissimilar treatment is therefore fully warranted. The denial of standing in the instant factual circumstance is compelled in view of the legitimate public policy to foster harmonious marital relations, to guard against assaults upon the family unit, and to protect the minor child from the permanent stigma and distress which would undeniably result were we to decide otherwise. Thus, we find no Equal Protection violation." (430 A.2d 1075, 1080;

see also: Quilloin v. Walcott, supra, 434 U.S. 246, 256.)

By reason of the above, application of section 621 against Briggs does not violate equal protection.

E. There Is No Merit to the Argument That Briggs Is Entitled to Visitation Rights With Zan, Nor Is There Any Triable Issue With Respect Thereto.

Briggs renews his last minute argument, raised for the first time in the prior appeal in the case, that he is entitled to visitation rights under *Civil Code* section 4601, without regard to whether or not he is established as the father of Zan. At all times prior to the appeal, Briggs never argued that his interest in Zan stemmed from anything other than his claim for paternity of the child.

The Court of Appeal correctly decided that section 4601 is not applicable to Briggs unless he can establish his paternity of Zan. (Opinion, pp. 8-9.)

It is established California law that visitation rights can be awarded to a nonparent only if the custody of the minor child is at issue. (*Reeves v. Bailey*, 53 Cal.App.3d 1019, 1024-1025 fn. 6 (1975); 4 Goddard, *Calif. Fam. Law Prac.*, 2nd ed., § 138, p. 231.) Since Briggs' claim is legally impossible, there exists no dispute as to the custody of Zan. Accordingly, section 4601 is on its face inapplicable.

Where there is no dispute regarding custody, "the state may not constitutionally interfere with the natural liberty of parents to direct the upbringing of their children" by ordering that third parties to a family unit be entitled to visitation rights. (*Odell v. Lutz*, 78 Cal.App.2d 104, 106 (1947).)

Even assuming *arguendo* that section 4601 is applicable, Briggs cites no authority showing that a person in his position is entitled to visitation rights. His declaration estab-

lishes an interest in the child no greater than that of the friendly babysitter. Visitation rights cannot be granted on this basis.

Visitation rights cannot be granted to Briggs because as the Court of Appeal found:

> "[W]e think it obvious that in the circumstances of this case such court-ordered visitation would be detrimental to the best interests of the child." (Opinion, p. 8.)

A child can only have one father. Frank is the father of Zan. Granting visitation rights to Briggs would only give credence and deference to his legally impossible claim that he is Zan's father. What is to prevent Briggs, during such a visit with Zan, from blurting out claims of paternity impliedly supported by the fact that he has judicially enforced rights of visitation? Once said, the words cannot be erased, and the harm caused cannot be cured.

Notwithstanding the arguments made by Briggs there is no triable issue as to the confusion, uncertainty and embarrassment Zan would likely suffer as a result of upholding Briggs' claim for visitation against the wishes of the mother and legally established father. For the same reasons, the court in *Petitioner F. v. Respondent R., supra*, 430 A.2d 1075, 1080, without trial, denied the same claim for visitation.

CONCLUSION.

For the reasons stated herein, the Rosses respectfully move the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered by the courts below.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Authority.

California Civil Code:

Section 230 (former)

"The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption."

Section 4600(a)

"The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."

Section 4601

"Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the Court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child."

Section 7004(a)(4)

". . . A man is presumed to be the natural father of a child if he meets the conditions set forth . . . in any of the following subdivisions:

"(4) He receives the child into his home and openly holds out the child as his natural child."

California Code of Civil Procedure:

Section 343

"An action for relief not hereinbefore provided must be commenced within four years after the cause of action shall have accrued."

California Evidence Code:

Section 621 (In effect 1970)

"Notwithstanding any other provisior of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate."

Section 621 (In effect 1977-1980)

"Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

Section 621 (In effect September 30, 1980)

"(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

"(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

* * *

"(g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980."

California Penal Code:

Section 270

"If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor . . . This statute shall not be construed so as to relieve such parent from the criminal liability defined herein for such omission merely because the other parent of such child is legally entitled to the custody of such child nor because the other parent of such child or any other person or organization voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so."